

MALLESONS STEPHEN JAQUES

By email

Mr Scott Gregson
General Manager
Adjudication Branch
Australian Competition & Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

29 May 2006

Attention: Mr Tim Scott

Dear Mr Gregson

Nestlé Australia Ltd Notification N31488 - record of pre-decision conference

We refer to the Commission's letters of 19 May 2006 and 25 May 2006 with respect to the Commission's record of the pre-decision conference regarding Nestlé Australia Ltd's ("Nestlé Australia") exclusive dealing notification N31488.

In the interests of reflecting the discussions that took place at the pre-decision conference, Nestlé Australia accepts the Commission's offer to place Nestlé Australia's annotated record of the pre-decision conference on the public register. A copy of Nestlé Australia's annotated record is attached to this letter for this purpose. Nestlé Australia's additional comments are marked up in revision mode.

If you wish to discuss any aspect of this letter, please contact me.

Yours sincerely

[Sgd] D Poddar

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Marked-up comments from Nestlé Australia Ltd, dated 29 May 2006

**Australian Competition
&
Consumer Commission**

PRE-DECISION CONFERENCE

Minutes

**Notification N31488
lodged by Nestlé Australia Ltd**

11 May 2006

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

Pre-Decision Conference: Notification N31488 lodged by Nestlé Australia Ltd

11 May 2006
Australian Competition & Consumer Commission
Level 7, Angel Place
123 Pitt Street
Sydney NSW 2000

Attendees:

Australian Competition and Consumer Commission

Jennifer McNeill, Member of the Commission
Scott Gregson, General Manager, Adjudication Branch
David Hatfield, Director, Adjudication Branch
Tim Scott, Project Officer, Adjudication Branch

Interested Parties

Richard Anderson, Company Secretary and General Counsel, Nestlé Australia Ltd
Dave Poddar, Partner, Mallesons Stephen Jaques
Jacki Cremer, Solicitor, Mallesons Stephen Jaques
John Joyce, Managing Director Buying, ALDI Stores
Shane Carter, Group Buying Director, ALDI Stores
Andrew Christopher, Partner, Baker & McKenzie
Georgina Foster, Senior Associate, Baker & McKenzie

Conference commenced: 9.10am

Introduction

Commissioner McNeill welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited the party that called the conference, Richard Anderson, on behalf of Nestlé Australia Ltd, to make an opening statement.

Opening Statements

Richard Anderson, Company Secretary and General Counsel, Nestlé Australia Ltd, stated that a formal submission from Nestlé Australia Ltd (Nestlé) will follow, but he wished to note that Nescafé Blend 43 is iconic for Nestlé. It is the most valuable brand, both in Australia and worldwide. Nestlé brought the brand to Australia in 1938 and has made an enormous investment in developing it since then. Nestlé was concerned that consumers might be confused and believe that the imported Nescafé products are the local brand. Nescafé Blend 43 is a unique specific blend with a taste to suit Australian preferences. Nestlé was worried that the taste differences between the imported Nescafé products and Nescafé Blend 43 could cause massive damage to the Blend 43 brand. Hence Nestlé had lodged the notification. Mr Anderson referred to the draft notice to revoke and what was said there about brand protection. He said that the notification does not prevent ALDI from importing Nestlé products. It merely requires

ALDI to differentiate those products from the local products of Nestlé when it does import and also wishes to obtain NESCAFÉ Blend 43 from Nestlé Australia. Mr Anderson drew attention to the beginning of the last sentence in paragraph 5.14 of the draft notice to revoke. He believed that there was an error in the sentence, as Nestlé never required ALDI to cease the supply of imported Nescafé products.

{Scott Gregson at that stage then pointed out that the sentence continues and clarifies the point stated in the first phrase. Mr Anderson responded that if the phrase was trying to imply that Nestlé asked ALDI not to supply the imports, it was wrong. The restriction was not to cease the sale of imports.}

Mr Anderson said that Nestlé disagrees with the ACCC's analysis of purpose. Nestlé had concerns about damage to the Nescafé Blend 43 brand and customer confusion. Nestlé also disagreed with the ACCC's analysis that the purpose was to signal to other retailers. He said that signalling could never have been Nestlé's purpose or intention. The conduct does not have the effect of substantially lessening competition, but, as this relied on quite technical arguments, it would be explained in the written submission. The differentiation requirement was not onerous, as it had been described in the draft notice.

In response to an inquiry from Commissioner McNeill as to the level of consumer contacts concerning ALDI's supply of imported Nescafé brand coffee, Mr Anderson responded that this information had been provided confidentially to the ACCC, and it would continue to be confidential. He noted that the imports were sold by ALDI represented approximately 1% of the Nestlé brand coffee products sold in Australia, but they constituted 10% of the complaints received by Nestlé. This figure was ~~noticeable~~ notable, as some considerable effort was required on the part of customers who wished to register a complaint to find the contact details for Nestlé. No Australian contact details were available on the labels of the imported coffee products.

When Commissioner McNeill asked, Mr Anderson gave brief details of the complaints. They mainly concerned the difference in taste, and disappointment with the product. One was about product safety. Mr Poddar questioned the drafting of paragraph 5.14 of the draft notice. Commissioner McNeill said that the ACCC will reflect on the drafting of the notice in the light of the submissions it expects to receive. When Mr Poddar continued to question the construction of the conduct as expressed in paragraph 5.14, Commissioner McNeill said that the ACCC would note this.

Commissioner McNeill asked John Joyce, on behalf of ALDI Stores, an interested party, if he wished to address the conference.

Mr Joyce stated that ALDI recognised that Nestlé had quality products. ALDI had gone to extraordinary lengths to differentiate the imported Nescafé products from the local ones. He said that, as of last week, ALDI had no complaints about the imports on record, and had received no response to ALDI's money back offer ~~for~~ from disappointed customers. ALDI does not agree that there is confusion about the products.

In response to a question from Commissioner McNeill, Mr Joyce said that he was confident that ALDI stores were carrying out the requests for differentiation. He could

not legislate for compliance, but he was confident that it had been raised at managing director level for each region and was confident that it was happening.

In response to a question from Commissioner McNeill regarding why ALDI considered that it must have Nescafé Blend 43 in its stores, Mr Joyce said that Nescafé Blend 43 is an iconic brand, rather than the highest selling brand in Australia. It is a good product and it is ALDI's biggest selling coffee, because it is iconic. He noted that ALDI also stocks some other icon brands, although they are not in any list of Top 20 or Top 50 biggest selling brands, and does not sell some of the biggest selling brands, such as cigarettes. He said that ALDI stocked Nescafé Blend 43 because it is a good product and customers want it. Mr Joyce said that ALDI used the expertise of employees who had worked in Australian grocery retailing to conclude that Nescafé Blend 43 was a product that ALDI must offer.

Replying to a question about the effect of the notification on ALDI, Mr Joyce said the withdrawal of supply has not been pleasant. It had been quite damaging given all the other products Nestlé has withheld, ALDI has had to find alternative products in the case of items such as frozen pizza. He also referred to the loss of MILO when that product was not related to the conduct. In the case of products such as the frozen pizza and yoghurt, it became necessary to work with manufacturers in order to develop a new product and launch it. This requires due diligence on things such as health standards and packaging. A change of supplier required a new tendering process, quality checks, benchmarking, factory checks, all of which was time consuming; and, at the conclusion, ALDI was providing customers with a changed product. It was time consuming but ALDI have the resources so that was "okay".

When asked about ALDI's current supply situation with Nescafé coffee and Milo, Mr Christopher declined to respond at the pre-decision conference, proposing to address that "offline" with the ACCC.

Commissioner McNeill opened the conference for discussion and invited additional questions in relation to the issues raised.

Mr Poddar referred to an actual incident of confusion in an ALDI store, which was observed by a lawyer from Mallesons. This incident, he said, was strong evidence controverting ALDI's assertions. Commissioner McNeill noted that the ACCC would consider such evidence when it was provided.

Mr Christopher made the following points:

- ALDI would prefer time to respond to any submission Nestlé might lodge, because, the proposed timelines for lodging submissions would work to the disadvantage of ALDI
- ALDI supported the present drafting in paragraph 5.14 of the draft notice, and he referred to correspondence between the parties to support this language
- no confusion about the imports had been communicated to ALDI
- to the extent that there is any confusion, it is generated by publicity from Nestlé Australia to denigrate the imported products

- the proposed differentiation, communicated to ALDI on 25 November 2005, requires ALDI to denigrate the imports
- ALDI has done enough to differentiate the imports from Nescafé Blend 43
- on the matter of Nestlé's purpose:
 - ALDI recognises that Nescafé Blend 43 is an icon
 - it wants to stock Nescafé Blend 43
 - it went for the imports because of the difficulty it encountered in obtaining supplies of Nescafé Blend 43 on what it considered appropriate terms
 - there is a market for the imports
 - ALDI agrees that Nestlé has an argument for maintaining the value of a premium brand, but consumers miss out if choice is lost
- ALDI can address the issue of alternative sources of supply with the ACCC on a confidential basis
- MILO had also been withdrawn
- ALDI wants to get Nescafé Blend 43 on the same terms as its competitors.

Mr Joyce said, in response to a question from Commissioner McNeill, that ALDI considers it had never received supplies of Nescafé Blend 43 from Nestlé on similar competitive terms as Coles or Woolworths. The fact that ALDI had borne a loss as a consequence of selling Nescafé Blend 43 was in the public domain. Mr Christopher said that ALDI recognises that retailers obtain discounts for volume when purchasing from manufacturers and wholesalers. However, the big sellers of Nescafé Blend 43 must be getting a deal in order to continue their discounting activity. He noted that Nescafé Blend 43 was advertised heavily.

Commissioner McNeill quoted a passage from a letter dated 19 July 2005 in which Mr Joyce told Nestlé that ALDI would have to re-assess the "long term ranging of Nescafé Blend 43" and "consider other options available to provide a better option". Mr Joyce said that, when he wrote the letter, ALDI still wanted to continue to sell Nescafé Blend 43, but if ALDI was placed under pressure, it might have to reconsider the situation; it was a "threat" that ALDI would take action; that the parties needed to come to terms.

Mr Christopher said that ALDI wanted to discuss its concerns about the continuity of supply on a confidential basis, when Mr Gregson raised the issue.

Mr Poddar stated that if Nestlé supplied Nescafé Blend 43 to ALDI, which, in turn, adequately differentiated the imports, ALDI was free to import the overseas Nescafé coffee products. He stated that the notification required adequate differentiation of the imports if Nestlé Australia supplied NESCAFÉ Blend 43 to ALDI. He also pointed out that Nestlé put a different construction on the notification. This was an important point. In response to a question from Commissioner McNeill about steps Nestlé might have taken to contact other parties regarding the supply of Nescafé Blend 43 to ALDI, Mr Poddar suggested that attention should be focused on what came within the "four corners" of the notification. ALDI could import coffee. It was reasonable for a brand owner to stipulate measures for the differentiation of its brand. Brand owners do this, it is common. When Commissioner McNeill noted that it was implicit in the draft notice

that the ACCC was reasonably happy with ALDI's existing differentiation measures and that Nestlé was not happy, Mr Poddar replied that a brand owner can express concern about the marketing of its brand. The ACCC has said that supply can be withdrawn if a brand owner is unhappy with marketing. He noted that circumstances have changed since the draft notice was issued, which would affect the outcome. He also noted that confusion is occurring and offered an adverse comment on ALDI's training of its staff, citing an example witnessed by a lawyer from Mallesons.

When Commissioner McNeill asked ALDI what aspect of the conduct was onerous, Mr Christopher referred to a particular form of words in the letter of 25 November 2005, which are quoted in paragraph 2.6 of the draft notice. In an exchange between Commissioner McNeill and Mr Poddar on the meaning of "all reasonable steps" as that phrase was used in the notification, Mr Poddar said that "reasonable" was what was reasonable. Mr Christopher referred to the form of words and typesetting that Nestlé expected ALDI to use in the advertising of the imports. It was not for Nestlé to dictate ALDI's advertising. There was a market for imports, because some consumers liked the taste. ~~He also questioned the accuracy of Nestlé's statements about the blending and roasting of coffee beans in Nescafé Blend 43.~~ Mr Joyce also referred to the front or back cover corrective advertising, the check by Nestlé of future ALDI advertising, and the labels on the jars.

Through the Chair, Mr Christopher asked Nestlé why Milo, frozen pizza and other products were also withdrawn. Mr Anderson declined to answer here (but will respond in Nestlé Australia's submission).

Mr Joyce referred to the discussions regarding a resolution of the issues between the parties. ALDI, he said, deals with suppliers in a fair and equitable way. The outcome of the discussion resulted in ALDI becoming desperate, at which time it looked for alternatives. He said that ALDI was keen to bring the matter to a conclusion.

Commissioner McNeill then called for any further comments. No further comments were made. The Commissioner then asked that further submissions be lodged with the ACCC by Thursday, 18 May 2006. Each party's response to the submission of the party should be lodged with the ACCC by Tuesday, 23 May 2006. The ACCC would be writing to those who attended the conference to provide details of how such submissions could be made, as well as to provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Commissioner McNeill then ended the conference and signed the certificate.

Conference closed: 10.05